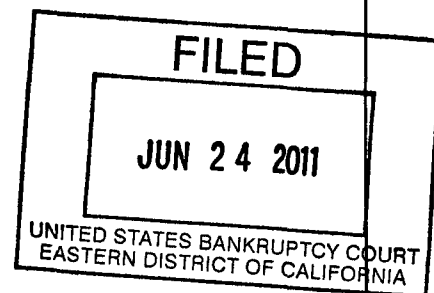


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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

In re)	Case No. 10-91936-E-7
)	
WALTER RALPH PINEDA,)	
)	
Debtor(s).)	
_____)	
)	
WALTER RALPH PINEDA,)	Adv. Pro. No. 10-9060
)	Docket Control No. TMT-2
Plaintiff(s),)	
v.)	
)	
BANK OF AMERICA, N.A., et)	
al.,)	
)	
Defendant(s).)	
_____)	

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION AND ORDER

In response to the complaint in this adversary proceeding, Defendants filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b), Federal Rules of Civil Procedure, and Rule 7012, Federal Rules of Bankruptcy Procedure.¹

¹/ The court has reviewed the 28-page complaint with 131 paragraphs of general and specific allegations. The court's decision is to grant the motion to dismiss as to all claims against all defendants, without prejudice and with leave to amend.

1
2 REVIEW OF COMPLAINT

3 In his Complaint, the Plaintiff alleges that he owns real
4 property commonly known as 22550 Bennet Road, Sonora, California,
5 95370, and that Bank of America, N.A. is attempting to foreclose on
6 the Bennet Road Property. ReconTrust Company, NA ("ReconTrust") is
7 alleged to be a subsidiary of Bank of America, N.A. and is acting
8 as the trustee under the deed of trust recorded against the Bennet
9 Road Property. The Plaintiff further alleges that Bank of New York
10 Mellon ("BNY") is a trustee for the GSR Mortgage Loan Trust 2003-9
11 ("GSR 2003-9"), and Goldman Sachs ("Goldman") is an investment
12 banker who sold certificates for GSR 2003-9. Complaint, ¶ 6.

13 The Plaintiff filed his First Amended Complaint ("FAC") on
14 February 4, 2011. In considering the Motion to Dismiss, the court
15 has carefully reviewed the FAC to identify the relevant
16 allegations. The FAC appears to proceed on two fronts. The first
17 being events that relate to his borrowing money secured by the real
18 property. The other events relate to the subsequent transfer of
19 the note and various investors purchasing interests in a
20 securitized pool of loans. The dispute begins with a loan obtained
21 by the Plaintiff which is documented by a promissory note ("Note")
22 and a deed of trust "Deed of Trust") recorded against real property
23 commonly known as 22550 Bennett Road, Sonora, California ("Bennett
24 Rd. Property") for a loan obtained from Bank of America, N.A.

25 The Plaintiff alleges that Bank of America, N.A. is attempting
26 to foreclose on the Bennett Rd. Property due to an alleged default
27 on the Note. ReconTrust Company, N.A. ("ReconTrust") is identified
28 as a subsidiary of Bank of America, N.A. and the person acting as
trustee for the foreclosure. Another entity identified as a Bank

1 of America, N.A. subsidiary, Bank of America Corp. LP ("BAC") is
2 alleged to be asserting rights as the servicer for the Note.

3 It is alleged that the Plaintiff had a long standing banking
4 relationship with Bank of America, N.A. dating back to 1972. This
5 bankruptcy relationship included the purchase and improvement of
6 his residence and for a second residence on the Bennett Road
7 Property. Plaintiff alleges that he achieved a "preferred
8 customer" status with Bank of America, N.A., and believed that Bank
9 of America, N.A. established a fiduciary relationship with the
10 Plaintiff. FAC ¶ 7.

11 The Plaintiff then suffered a serious illness which required
12 extensive hospitalization. This medical condition prevented
13 Plaintiff from meeting his financial obligations, and he requested
14 a loan modification from Bank of America, N.A.. FAC ¶ 8.

15 In 2008 Plaintiff submitted a request for a home loan
16 modification through the Home Affordability Program ("HAMP").
17 After one year without an answer to the HAMP application, Plaintiff
18 filed a complaint with the Comptroller of the Currency. Plaintiff
19 alleges that Bank of America, N.A. denied ever receiving a HAMP
20 application, denied that Plaintiff wanted to stay in his home, and
21 represented to the Office of the Comptroller that the Note was not
22 sold and that the investor in the Note was Bank of New York Mellon,
23 N.A. ("BNYM"). FAC ¶ 8.

24 The FAC contains an extensive discussion of the business
25 operations of Goldman Sachs, Inc. ("GS") in the selling of
26 interests in securitized loan portfolios,² that other courts have

27
28 ^{2/} The court uses the term "securitized loan portfolio" to
identify the business practices of assembling a large number of

1 required the securitized loan portfolio process to be strictly
2 followed for the notes in such portfolios to be enforced, and that
3 the "owner" of the promissory note evidencing the debt had the
4 right to enforce the obligation through foreclosure. The
5 allegations include reference to Bank of America, N.A. staying
6 foreclosures while it addressed the issue of "Robo Signing"³ of
7 foreclosure documents without verification of the facts. The
8 allegations in the FAC include reference to the Securities and
9 Exchange Commission initiating an investigation of financial
10 institutions, including Bank of America, N.A. and GS.

11 The FAC also includes a allegation that Bank of America, N.A.
12 would retain "possession" of a Note after it was being included in
13 securitized loan portfolio. Plaintiff assert that such practice
14 violates unidentified provisions of the Securities Exchange Act,
15 California Civil Code § 2739,⁴ Section 3-203 of the Uniform
16
17
18
19
20

21 home loans into a trust or other entity and then selling
22 fractional beneficial interest in the trust or other entity to
23 investors.

24 ^{3/} "Robo Signing" is commonly identified as a process
25 relating to judicial foreclosures where verified pleadings and
26 declarations were executed and filed with the courts when the
persons providing the verification or testimony had no knowledge
of the facts stated therein.

27 ^{4/} From reviewing the Opposition, it appears that this
28 reference is a misstatement, and the Plaintiff intends to refer
to California Civil Code § 2934a governing substitutions of
trustees under deeds of trust.

1 Commercial Code,⁵ and Business and Professions Code § 17200.⁶ It
2 is asserted that the violation of these provisions affests the
3 validity of the Note retained by Bank of America, N.A. as a secured
4 instrument.

5 **COUNT I - FRAUD**

6 Plaintiff asserts that Bank of America, N.A., GS, Goldman
7 Sachs Mortgage Securities Corporation ("GSSC"), and BNYM failed to
8 provide Plaintiff with an accounting of monthly payments from
9 September 2003 through August 2006. It is alleged that the
10 payments were diverted to other accounts in GSR 2003-9, which
11 deprived Plaintiff of the reduction of the amount due on the Note.
12 Further, Bank of America BAC, GS, and GSSC refuse to disclose other
13 amounts received through credit default swaps.

14 Plaintiff alleges that GS acted as an investment banker to
15 solicit investors, and that the funds were used to make loans,
16 including the monies borrowed by Plaintiff for the obligation
17 evidenced by the Note. After the loan was made to Plaintiff, his
18 account⁷ to GS for inclusion in a securitized loan portfolio, with
19 Bank of America, N.A. retaining possession of the Note. FAC ¶¶ 23
20 and 24. Plaintiff further alleges that Bank of America, N.A. and
21

22
23 ⁵/California has adopted its version of the Commercial, with
24 Division 3, Section 3302 defining a "holder in due course." This
25 provision does not govern the general enforceability of
instruments. See California Commercial Code §§ 3301, 3305, 3306,
3309 and 3312.

26 ⁶/California Business and Professions Code § 17200 et. seq.
27 is an act which provides rights and remedies for an unlawful,
unfair or fraudulent business act or practice.

28 ⁷/Plaintiff uses the term "account" without providing any
definition or description as to what is meant by that term.

1 GS entered into a Pooling and Securitization Agreement ("PSA") by
2 which Bank of America, N.A. would obtain loans to be placed in a
3 securitized loan portfolio. Plaintiff alleges that GS would then
4 pay Bank of America, N.A. unidentified "kickbacks" for providing
5 adjustable rate loans for inclusion in the portfolio. On
6 information and belief Plaintiff alleges that Bank of America, N.A.
7 received excessive origination fees of \$4,526.00 and \$2,326.50 for
8 hazardous insurance paid by Plaintiff as the "kickbacks." It is
9 alleged that these amounts violated the Real Estate Settlement
10 Procedures Act ("RESPA"), specifically identifying Section 6
11 thereof. FAC ¶¶ 26 and 27.

12 Plaintiff further asserts that it was not disclosed
13 Plaintiff's monthly payments were credited to other accounts known
14 as "senior tranches" from September 2002 through 2008. This
15 conduct is asserted to violate the Truth in Lending Act (TILA),
16 without reference to a specific provision, and RESPA, specifically
17 identifying Section 6.

18 Plaintiff alleges that his note and deed of trust identify
19 Bank of America, N.A. as the lender and beneficiary. He contends
20 that this is not accurate, as the loans were originated for use in
21 the securitized loan portfolio. Since the Note was to be used for
22 securitized loan portfolio, Plaintiff asserts the use of his name,
23 signature (presumably on the Note and deed of trust), and
24 creditworthiness violated TILA, RESPA, California Civil Code 1709,⁸
25 and Business and Professions Code § 17200. FAC ¶¶ 30 and 31.

26 Plaintiff asserts that under a Sales and Servicing Agreement
27

28 ⁸/California Civil Code § 1709 is the codification of the
traditional tort of fraud.

1 between GS and Bank of America, N.A. grants "recourse" to GS in the
2 event that there is a delinquency in loan payments. Further, under
3 the PSA Bank of America, N.A. has an obligation to make advances
4 for delinquent payments on the loans.

5 Plaintiff alleges that GS did not comply with the requirements
6 of the PSA to assign all right, title and interest into GSR 2003-9.
7 Because of that, his loan was not transferred into GSR 2003-9 and
8 GSSC was not entitled to receive Plaintiff's payments from 2002
9 through 2008. Further, Bank of America, N.A. did not deliver the
10 Note to GS as required by Uniform Commercial Code §§ 9-9313-9314.⁹
11 FAC ¶¶ 39-42.

12 Plaintiff's FAC asserts that the monies generated by the
13 payments on the loans in GSR 2003-9 were further sold. The failure
14 to disclose that others had purchased the right to these monies is
15 alleged to TILA, 15 U.S.C. § 1600 et. seq.,¹⁰ and California
16 Business and Professions §§ 17200 et. seq.

17 In October of 2009, Plaintiff alleges that he was notified by
18 Bank of America, N.A. that BAC would commence servicing the loan.
19 It is alleged that on January 21, 2010, the Plaintiff made demand
20 on Bank of America, N.A. for verification of the obligation owing
21 on the Note pursuant to 11 U.S.C. § 1692g¹¹ and RESPA. Plaintiff
22

23 ⁹/California Commercial Code §§ 9313 and 9314 relate to a
24 person taking a security interest in personal property and the
25 perfection of that security interest by taking possession or
control of the collateral.

26 ¹⁰/This appears to be an incorrect citation. Presumably
27 Plaintiff is referencing § 1601 et. seq., the Truth in Lending
Act.

28 ¹¹/This reference is to the Federal Fair Debt Collection
Practices Act, 15 U.S.C. §§ 1692 et. seq.

1 asserts that he received what was identified as a partial
2 accounting for the period January 2006 - August 2008. It is
3 alleged that the accounting was incomplete because it did not
4 include payments made by third-parties.

5 In January 2010, Plaintiff received a notice of default under
6 the deed of trust, which was recorded by ReconTrust. A
7 substitution of trustee under the deed of trust and an assignment
8 of the deed of trust were recorded on February 16, 2010. Plaintiff
9 did not receive notice of either the assignment of the deed of
10 trust (to GRS 2003-9) or substitution of trustee.

11 Plaintiff alleges that the recording the assignment of the
12 deed of trust to GRS 2003-9 was for the purpose "of conversion of
13 Plaintiff's approximate \$300,000 investment towards the purchase
14 and improvements" in the Bennett Road Property. This recording of
15 the assignment of the deed of trust is alleged to violate
16 California Civil Code § 1709 (Fraud). The alleged fraud is Bank of
17 America, N.A. misrepresenting to the County Recorder the Bank's
18 status as beneficiary under the Note. It is contended that Bank of
19 America, N.A. knew this was a misrepresentation, intended to induce
20 Plaintiff into believing that Bank of America, N.A. was the
21 beneficiary, Plaintiff relied on the misrepresentation and make
22 payments to GSR 2003-9, which had no right to receive payments. It
23 is asserted that the damages consist of the lack of reduction on
24 the Note obligation and the millions of dollars received by GSSC
25 from third-parties by "shorting" the GSR 2003-9 certificates.

26 Plaintiff contends that the 2003 "assignment" to GS
27 (presumably this references the Note)"extinguished" all of Bank of
28 America, N.A.'s contractual rights. Further, this 2010 assignment

1 of deed of trust will subject Plaintiff to "double financial
2 jeopardy" through claims of numerous and unknown bona fide
3 purchasers. It is also alleged that the substitution of trustee
4 was backdated by Bank of America, N.A. to match the January 22,
5 2010 assignment and notice of default.

6 Count I continues through paragraph 98 of the Complaint
7 repeating the allegations of fraud and misconduct with the transfer
8 of the Note and Deed of Trust after the loan with Plaintiff was
9 closed. The Plaintiff also contests whether BNYM is the trustee of
10 GSR 2003-9. Plaintiff alleges that is part of the fraud on
11 Plaintiff and investors in GSR 2003-9.

12 **COUNT II - BREACH OF CONTRACT**

13 Plaintiff asserts that the Deed of Trust contains specific
14 requirements for the power of sale, transfer services (Paragraph
15 20), accounting for third-party payments (Paragraph 11), and
16 procedures for the substitution of a trustee (Paragraph 24). It is
17 contended that Bank of America, N.A. breached this contract by
18 instructing ReconTrust to file a notice of default which states
19 that Bank of America, N.A. is the "present beneficiary" under the
20 Deed of Trust and ReconTrust is the Bank's agent. This breach was
21 done to convert the \$300,000.00 which Plaintiff has invested in the
22 Bennet Road Property.

23 It is further contended that Bank of America, N.A. and BAC
24 further violated the contract by failing to inform the Plaintiff of
25 transferring servicing to BAC. Additionally, the contract was
26 breached by Bank of America, N.A. failing to account for "third
27 party payments in 'excess' of the security interest in an attempt
28 to cover the millions of dollars Defendant [Bank of America, N.A.]

1 and Defendant GSSC received by third party payments including
2 credit default swaps." FAC ¶ 104.

3 Plaintiff asserts that he has been damaged because Bank of
4 America, N.A.'s and GSSC conduct resulted in a "60% loss in
5 property value and the highest rate of unemployment since the Great
6 Depression." Plaintiff also believes he is entitled to punitive
7 damages because Bank of America, N.A.'s breach of contract also
8 breached the covenant of good faith. Further, the violations of
9 RESPA and TILA give rise to defense and recoupment or \$220,000 of
10 loan payments made by Plaintiff.

11 **COUNT III - UNJUST ENRICHMENT**

12 Because GSSC received the monthly payments on the Note from
13 August 2003 through August 2008 illegally it has been unjustly
14 enriched. Further, GSSC's conduct in "shorting" GSR 2003-9
15 tranches "resulted in millions of dollars of profits and [unjust
16 enrichment] as a result of fraud and deceit perpetrated on
17 Plaintiff and the investors of [SGR 2003-9] trust."

18 **COUNT IV - DECLARATORY RELIEF**

19 Plaintiff seeks a declaration of the respective rights of the
20 Plaintiff, Bank of America, N.A., SG, GSSC, BNY, and ReconTrust in
21 the Note and Deed of Trust. The correct party who owns the Note
22 and has the right to foreclose under the Deed of Trust must be
23 determined.

24 **PRAYER FOR RELIEF**

25 By this FAC, the Plaintiff seeks a determination that the
26 obligation owing on the Note is dischargeable in this bankruptcy
27 case. Further, a determination that GSR 2003-9 unlawfully received
28 the mortgage payments for the period from August 2002 through

1 August 2008, and that Plaintiff is entitled to recover those
2 payments. Further, that the lien held by GSR 2003-9 is void and
3 unenforceable. Additionally, that GSSC, GS, and all other
4 Defendants be ordered to pay all ill gotten gain to Plaintiff and
5 investors who were deceived. Further monetary damages of
6 \$300,000.00 for general damages, \$400,000.00 in special damages,
7 and an unstated amount of punitive damages. Plaintiff wants a
8 judgment for an accounting fo all monies paid by Plaintiff and
9 others, including from credit default swaps. Finally, a
10 determination that the substitution of trustee and notice of
11 default were invalid.

12 **RULING ON MOTION TO DISMISS**

13 All of the Defendants have joined in filing a Motion to
14 Dismiss. The Motion pleads with particularity 12 ground for the
15 dismissal of the FAC. These grounds will be addressed in the order
16 stated in the Motion, with the court's ruling on each ground.

17 In considering a motion to dismiss, the court starts with the
18 basic premise that the law favors disputes being decided on their
19 merits, and a complaint should not be dismissed unless it appears
20 beyond doubt that the Plaintiff-Debtor can prove no set of facts in
21 support of his claim which would entitle him to the relief.
22 *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt
23 with respect to whether a motion to dismiss will be granted should
24 be resolved in favor of the plaintiff. *Pond v. Gen. Electric Co.*,
25 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining
26 the propriety of a dismissal before trial, allegations in the
27 complaint are taken as true. *Kossick v. United Fruit Co.*, 365 U.S.
28 731, 732 (1961).

1 The complaint must provide more than labels and conclusions,
2 or a formulaic recitation of a cause of action; it must plead
3 factual allegations sufficient to raise more than a speculative
4 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
5 (2007). Federal Rule of Civil Procedure 8, made applicable to this
6 adversary proceeding by Federal Rule of Bankruptcy Procedure 7008,
7 requires that complaints contain a short, plain statement of the
8 claim showing entitlement to relief and a demand for the relief
9 requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell*
10 *Atlantic*, the pleading standard under Rule 8 does not require
11 "detailed factual allegations," but it does demand more than an
12 unadorned accusation or conclusion of a cause of action. *Bell*
13 *Atlantic*, 550 U.S. at 555.

14 To survive a motion to dismiss, a complaint must contain
15 sufficient factual matter, accepted as true, to state a
16 claim to relief that is plausible on its face. A claim
17 has facial plausibility when the plaintiff pleads factual
content that allows the court to draw the reasonable
inference that the defendant is liable for the misconduct
alleged.

18 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed.
19 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8
20 also requires that allegations be "simple, concise, and direct."
21 Fed. R. Civ. P. 8(d)(1).

22 In ruling on a 12(b)(6) motion to dismiss, the Court may
23 consider "allegations contained in the pleadings, exhibits attached
24 to the complaint, and matters properly subject to judicial notice."
25 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court
26 need not accept unreasonable inferences or conclusory deductions of
27 fact cast in the form of factual allegations. *Sprewell v. Golden*
28 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the

1 court required to "accept legal conclusions cast in the form of
2 factual allegations if those conclusions cannot be reasonably drawn
3 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d
4 752, 754-55 (9th Cir. 1994).

5 Though the court takes into account that the Plaintiff is
6 electing to represent himself and gives him leeway with respect to
7 his pleadings and use of legal terminology, the court cannot
8 attempt to construct his arguments or allegations. The court will
9 also not presume allegations omitted are "facts" in the Plaintiff's
10 favor.

11 In reviewing the FAC, the court first notes that it suffers
12 from an inconsistent duality. While a party may plead inconsistent
13 theories, the FAC suffers from inconsistent facts. A portion of
14 the FAC is premised on Bank of America, N.A. having all of its
15 rights extinguished by the transfer of the Note. Other allegations
16 are that Bank of America, N.A. never effectively transferred the
17 Note. In part of the FAC improper acts have occurred because the
18 Note was in a securitized loan portfolio, which in other parts
19 there was no transfer to the portfolio.¹²

20
21 ^{12/}In the zeal of filing a complaint, plaintiffs often feel
22 compelled to plead and state everything they can think of in
23 arguing their case. The complaint is the document in which the
24 plaintiff pleads plausible claims, not the time to try and prove
25 his case. If the Plaintiff decides that filing an amended
26 complaint is appropriate, he may well wish to focus his
27 allegations on his rights, his claims, and conduct of the
28 defendants against the plaintiff and his rights. From what the
court understands from the FAC now before it, the Plaintiff
borrowed money from Bank of America, N.A. and provided Bank of
America, N.A. with a deed of trust to secure the repayment of the
monies. Plaintiff was not the purchaser of negotiable
instruments from Bank of America, N.A., an investor in any trust
set into which were transferred Bank of America, N.A. promissory
notes, or engaged in any default swap transactions.

1 The Plaintiff, as evidenced in the prayer, also appears to
2 have fallen into the illogical trap that he is entitled to a second
3 residence for free because of what third-parties did with, and to,
4 each other. With limited exception, all of the conduct of the
5 Defendants complained about arose after the Plaintiff obtained the
6 monies he wanted from Bank of America, N.A. through the loan.
7 Though the Plaintiff received everything he was entitled to receive
8 from the loan (the money), Plaintiff believes that because of
9 subsequent financial transaction involving the Note (a negotiable
10 instrument which is freely transferable under the Commercial Codes
11 enacted by the States) were entered into by Bank of America, N.A.
12 and others, any obligation of Plaintiff on the Note were
13 extinguished. The FAC does not allege any claims or grounds by
14 which the Note, the negotiable instrument, has been destroyed.¹³

15 The court also notes that the FAC also suffers from a common
16 drafting trap of if more can be said, then it must be significant.
17 This leads to the FAC not making allegations about the Defendant,
18 but the financial community in general. The FAC contains extensive
19 references to Senate Finance Committee investigations, "Burger King
20 Kids," charges of misrepresentations to investors in securitized
21 loan portfolios, and "Robo Signers." What the Plaintiff misses in
22 including all of these broad discussions and allegations is the
23 specifics of what was done to this plaintiff.

24 Though sought in the prayer, Plaintiff does not assert a claim

26 ¹³/The Plaintiff has not provided the court with any legal
27 authority for the proposition that post-loan business
28 transactions between Bank of America, N.A. and third-parties for
the transfer and negotiation of the Note renders the Plaintiff's
obligation to pay the Note invalid or unenforceable.

1 or allege grounds by which the Deed of Trust, an interest in
2 property, has been destroyed. Property rights are not lightly
3 treated under the law, and such rights are not easily destroyed.
4 In California, the security is not severed from the underlying
5 obligation merely by the transfer of the note. "The note and the
6 mortgage are inseparable; the former as essential, the later as an
7 incident. An assignment of the note carries the mortgage with it,
8 while an assignment of the latter alone is a nullity." *Carpenter v.*
9 *Longan*, 83 U.S. 271, 274 (1872); accord *Henley v. Hotaling*, 41 Cal.
10 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170
11 (1932); Cal. Civ. Code §2936. Therefore, if one party receives the
12 note and another receives the deed of trust, the holder of the note
13 prevails regardless of the order in which the interests were
14 transferred. *Adler v. Sargent*, 109 Cal. 42, 49-50 (1895).

15 Conspicuously missing from the FAC are any allegations that
16 the Plaintiff has made all payments due on the Note and no default
17 exists. Rather, from the allegations in the FAC, the court infers
18 that due to the Plaintiff's illness he fell into default on the
19 Note and sought the HAMP restructure. The Plaintiff's inability to
20 have income to pay the monthly amounts due on the Note were
21 exacerbated by the fall in real estate values, precluding him from
22 refinancing the loan. Not an uncommon story.

23 The FAC contains extensive discussion of relating to the
24 investment in mortgage portfolios and various financial
25 transactions, including "default swaps." The Plaintiff contends
26 that the financial transaction that Bank of America, N.A. and
27 others entered into with the Note inure to the Plaintiff's benefit.
28 The Plaintiff offers no allegations as to how or why, after he has

1 received everything he is entitled to (the loan proceeds) for the
2 Note (negotiable instrument) he gave to Bank of America, N.A., the
3 Plaintiff is entitled to a passive participation in the financial
4 transaction involving the negotiable instrument.

5 The FAC also contains an interesting contention that lenders
6 cause a 60% drop in the value of the Plaintiff's property. Some
7 contend that real estate values were artificially inflated, and
8 that an "irrational exuberance" existed concerning the ever
9 increasing real estate sales prices. The run-up in real estate
10 prices in the first half of the 2000's is reminiscent of the rapid
11 increase in real estate sales prices in the 1980's, fuel by the
12 Savings and Loan lending practices. The seemingly never ending
13 increase in real estate prices came crashing down in the early
14 1990's, leaving many home owners with mortgages significantly in
15 excess of the price that a willing seller would pay once the
16 freewheeling lending practices ceased.

17 STANDING

18 The Defendants first attack the FAC on the basic issue of
19 standing. Standing is a Constitutional standard which requires
20 there to be an actual case or controversy between the parties.

21 Article III of the Constitution confines federal courts
22 to decisions of "Cases" or "Controversies." Standing to
23 sue or defend is an aspect of the case-or-controversy
24 requirement. (Citations omitted.) To qualify as a party
25 with standing to litigate, a person must show, first and
26 foremost, "an invasion of a legally protected interest"
that is "concrete and particularized" and "actual or
imminent." (Citations omitted.)...Standing to defend on
appeal in the place of an original defendant, no less
than standing to sue, demands that the litigant possess
'a direct state in the outcome.' (Citations omitted.)

27 Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117
28 S.Ct. 1055 (1997).

1 Defendants assert that when the Plaintiff filed this Chapter 7
2 case the Bankruptcy Code created the bankruptcy estate which
3 includes all of the claims at issue in this Adversary Proceeding.
4 11 U.S.C. § 541(a). In a Chapter 7 case, the Chapter 7 Trustee
5 alone has the ability to sue on behalf of the bankruptcy estate.
6 *Estate of Spirtos v. One San Bernardino County Superior Court Case*
7 *Numbered SPR 02211 (In re Estate of Spirtos)*, 443 F.3d 1172, 1176
8 (9th Cir. 2006); 11 U.S.C. § 323(b). As one court stated,

9 [A]ny unliquidated lawsuits initiated by a debtor
10 prepetition (or that could have been initiated by the
11 debtor prepetition) become part of the bankruptcy estate
12 subject to the sole direction and control of the trustee,
unless exempted or abandoned or otherwise revested in the
debtor. The debtor lacks standing in a chapter 7 case to
prosecute claims that are property of the estate.

13 *In re Bailey*, 306 B.R. 391, 392-93 (Bankr. D.D.C. 2004) (citations
14 omitted).

15 The Plaintiff responds that he communicated with the Chapter
16 7 Trustee at the First Meeting of Creditors. The Plaintiff asserts
17 that the Chapter 7 Trustee believes that Plaintiff can assert the
18 claims in this case. In the file for the Chapter 7 case, the
19 Trustee has filed a Report of No Distribution. Dckt. 28, filed on
20 August 21, 2010. However, the Plaintiff did not file an Amended
21 Schedule B listing this claim as an assert until November 30, 2010.
22 Dckt. 33. The Trustee has taken no action since November 30, 2010,
23 to modify the Report of No Distribution. Additionally, the
24 Plaintiff disclosed the existence of these claim on the original
25 Schedule C (though the basis for the exemption was not stated)
26 filed in this case, which predated the Report of No Distribution by
27 two and one-half months.

28 In his Amended Schedule C Plaintiff exempted the claims

1 pursuant to California Code of Civil Procedure § 703.140(b)(11)(d).
2 (See Schedule C, No. 10-91936 Dckt. 16; Amended Schedule B and C,
3 No. 10-91936 Dckt. 33.) While an exemption does not remove the
4 asset from the bankruptcy estate, the Plaintiff has rights in these
5 claims. The Plaintiff must address with the Trustee whether all of
6 the claims will be abandoned by the Trustee or if there is a
7 litigation agreement for the Plaintiff to prosecute the entire
8 action.

9 Further, Fed. R. Civ. P. 17(a)(3) and Fed. R. Bankr. P. 7017
10 provides for a real party in interest to substitute into a case,
11 ratify, or join an action. This includes a debtor obtaining either
12 the participation or authorization of the trustee to prosecute the
13 action, or an abandonment of the rights that are the subject of the
14 action. The court notes that the Debtor has not taken any action,
15 as reflected on the court's docket, to obtain either an abandonment
16 of these rights from the trustee or the joinder of the trustee in
17 this adversary proceeding. While not fatally defective at this
18 juncture, it is an indication that this adversary proceeding will
19 not be properly prosecuted and likely be dismissed if the matter is
20 not promptly addressed by the Debtor.

21 The Motion to Dismiss for lack of standing is denied without
22 prejudice.

23 **EXTINGUISHMENT OF RIGHTS IN BANK OF AMERICA, N.A.**

24 A significant contention in the FAC is that the transfer of
25 the Note to GSR 2003-9 extinguished all rights of Bank of America,
26 N.A.. The Plaintiff's opposition does not state how the transfer
27 terminated such rights, though the court interprets the argument to
28 be that Bank of America, N.A. "transferred" its rights as payee.

1 However, that does not mean that Bank of America, N.A. does not
2 have any rights. In this case, Bank of America, N.A. states in the
3 Points and Authorities to the Motion that it is alleged by
4 Plaintiff that Bank of America, N.A. continues to have rights by
5 virtue of the PSA, in which Bank of America, N.A. identifies as the
6 servicer of the loan. The court does not determine what rights the
7 Bank may or may not have in the context of the present motion.
8 Rather, the court determines whether this Plaintiff has been able
9 to state a plausible claim.

10 Exhibit 8 to the Complaint is a copy of the substitution of
11 trustee and assignment of deed of trust dated January 22, 2010,
12 which was recorded on February 9, 2010. This document states that
13 Bank of America, N.A., the original payee and beneficiary, is
14 identified as the "beneficiary" as the servicer for GSR 2003-9.
15 The deed of trust follows the note, and if the Note has been
16 transferred to GSR 2003-9 (legally, it would be transferred to the
17 trustee for GSR 2003-9), then GSR 2003-9 has the beneficial
18 interest in the deed of trust. Arguably, the Substitution of
19 Trustee and Assignment of Deed of Trust does not precisely name the
20 parties, it is consistent with the asserted transaction. GSR 2003-
21 9 can elect to act through agents, such as a loan servicer, to take
22 actions such as foreclosures. See *Baisa v. Indymac Fed. Bank*, No
23 CIV-09-1464 WBS JMR, 2009 WL 3756682, *3 (E.D. Cal. Nov. 6, 2009)
24 ("MERS had the right to assign its beneficial interest to a third
25 party"); *Weingartner v. Chase Home Finance, LLC*, 702 F. Supp. 2d
26 1276, 1280 (D. Nev. 2010), "Courts often hold that MERS does not
27 have standing as a beneficiary because it is not one, regardless of
28 what a deed of trust says, but that it does have standing as an

1 agent of the beneficiary where it is the nominee of the lender (who
2 is the 'true' beneficiary." Emphasis added.

3 As stated above, the Plaintiff has taken alternative factual
4 allegations as to Bank of America, N.A. having transferred the
5 note, not transferred the note, and transferred the note but
6 continued to service the Note through its subsidiary BAC Home Loans
7 Servicing, LP. Exhibit 7, April 21, 2010 letter by Plaintiff to
8 Bank of New York Mellon. But see Paragraph 55 of the FAC alleging
9 that all of Bank of America, N.A.'s contractual rights have been
10 "extinguished."

11 The Plaintiff fails to state a plausible claim that Bank of
12 America, N.A. has no right to enforce the deed of trust which
13 secures the Note. The possibility that the monies owed on the Note
14 to be paid for by the collateral (the Bennett Road Property) may go
15 to the principal of the Bank (GSR 2003-9) does not preclude Bank of
16 America, N.A. from fulfilling obligations as the servicer.

17
18 **FRAUD IN CONNECTION WITH THE SALE OF THE
RESIDENCE (WRONGFUL FORECLOSURE)**

19 A plaintiff cannot challenge a foreclosure proceeding (whether
20 it is pending or has already occurred) without first credibly
21 alleging tender. *Karlsen v. American Savings and Loan Assoc.*,
22 15 Cal. App. 3d 112, 117-18 (1971); *FPCI RE-HAB 01 v. E & G*
23 *Investments, Ltd.*, 207 Cal. App. 3d 1018, 1021 (1989). A valid and
24 viable offer of tender means that it is made in good faith, the
25 party making the tender has the ability to perform, and the tender
26 is unconditional. See MILLER & STARR, CALIFORNIA REAL ESTATE,
27 §§ 1493-1495 (3d ed. 1989). A failure to allege such tender makes
28 the claim deficient on its face. *Alicea v. GE Money Bank*, 2009 WL

1 2136969 (N.D. Cal. 2009). However, the requirement of tender may
2 be waived. *Standley v. KNAPB*, 113 Cal.App. 91, 102 (1031);
3 *Humboldt sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); and
4 MILLER & STARR, CALIFORNIA REAL ESTATE, § 10:212 (3d ed.)

5 The FAC is clear on its face that there has been and is no
6 tender being made to cure any the default in the payments due on
7 the Note. The Plaintiff instead has attempted to obtain a
8 modification of the Note, and is looking to have part of the debt
9 forgiven, reducing the amount to be paid to the present value of
10 the property. Plaintiff further alleges that Defendants never
11 considered his loan modification, and lied to the Comptroller of
12 Currency about his loan modification request. Proposing a loan
13 modification (and promising to pay based on receiving a
14 modification) is not the same thing as promising to pay what is
15 actually owed on the note.

16 But as discussed in the following section on fraud in general,
17 the Plaintiff does not allege what fraud Bank of America, N.A. and
18 the other Defendants have committed as to the Plaintiff. Rather,
19 the Plaintiff pleads that he disputes that Bank of America, N.A.
20 had the right and authority to enforce the deed of trust which
21 secures the Note. Merely because there is a dispute over certain
22 rights does not mean that fraud has been committed. It is common
23 for parties to disagreement, and such disagreement is often
24 necessary for there ever to be a lawsuit.

25 Plaintiff has not alleged tender in this case, has not alleged
26 grounds by which tender should be waived, and fails to allege
27 grounds by which the Note is not enforceable. The Complaint is
28 deficient on its face and must be dismissed without prejudice.

1 The motion to dismiss is granted, without prejudice and with
2 leave to amend.

3 **FRAUD AND THE UCL**

4 Plaintiffs also claims that the Defendants committed fraud in
5 relation to his loan. The Ninth Circuit Court of Appeals
6 interprets Federal Rule of Federal Procedure 9(b), as made
7 applicable to this adversary proceeding by Federal Rule of
8 Bankruptcy Procedure 7009, to require that the complaint
9 (1) specify the fraudulent representations; (2) specify the
10 representations were false when made; (3) identify the speaker;
11 (4) state when and where the statements were made; and (5) state
12 the manner in which the representations were false and misleading.
13 *Decker v. GlenFed Inc.*, (*In re Glenfed, Inc. Sec. Litig.*), 42 F.3d
14 1541, 1547 n.7 (9th Cir. 1994) (en banc), superseded by statute on
15 other grounds as stated in *In re Silicon Graphics, Inc.*, 970 F.
16 Supp. 746, 754 (N.D. Cal. 1997); *Lancaster Cmty. Hosp. v. Antelope*
17 *Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991); *Vess v.*
18 *Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). This is
19 consistent with common law fraud in California. *Seeger v. Odell*, 18
20 C.2d 409 (1941), and *Manderville v. PCG&S Group*, 146 Cal.App.4th
21 1486 (2007). Merely because a dispute exists between the parties
22 does not support a claim for fraud. The Plaintiff must at least
23 plead more to survive a motion to dismiss.

24 A fraud claim is subject to the additional pleading
25 requirements of Fed. R. Civ. P. 8(b) and Fed. R. Bankr. P. 7008.
26 The Plaintiff may not merely recite the statutory elements for
27 fraud, but must plead a plausible case based on the alleged facts in
28 this case.

1 This Plaintiff first alleges that Defendants committed fraud
2 in securitizing his note. It is contended, without support, that
3 any potential subsequent sale or transfer of the Note (an
4 instrument, and likely a negotiable instrument) must have been
5 first disclosed to the Plaintiff prior to his borrowing the money
6 from Bank of America, N.A.. No legal basis for this contention has
7 been presented to the court. In response to this allegation, Bank
8 of America, N.A. directs the court to paragraph 20 of the deed of
9 trust, which the Defendants have included as an exhibit, but has
10 not been included as part of the FAC. While the Bank is correct
11 that this paragraph discloses that the Note may be transferred, it
12 is buried in a number of dense, legalistic paragraphs separate and
13 apart from the Note or the loan documents.

14 More significant to the court is that the Debtor never alleges
15 that he intended to be part of a further transaction concerning the
16 potential sale or transfer of the Note. The only transaction
17 between the Plaintiff and Bank of America, N.A. was the Plaintiff
18 obtaining loan proceed from the Bank. The Debtor obtained a loan
19 and had set terms by which he had to repay the obligation.
20 Irrespective of what further transactions occurred with the Note,
21 the Plaintiff's obligations and rights would did not change.

22 Plaintiff further alleges that this securitization somehow
23 stripped off the security interest. As to the first allegation,
24 Plaintiff fails to state how having his note sold or transferred to
25 the GSR-09 trust caused him any harm or what fraud was committed to
26 this Plaintiff. If there is no harm, there is no relief that the
27 court can grant. It is not alleged that any of the Plaintiff's
28 rights and obligations under the Note were altered.

1 As to the second contention, there has been no legal authority
2 presented to the court for proposition that securitizing a note
3 somehow strips off the security interest. It settled law that a
4 promissory note and its security interest are inseparable; an
5 assignment of the note carries the security interest with it.
6 *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land*
7 *Co.*, 216 Cal. 165, 170, 13 P.2d 686 (1932); *accord* *Carpenter v.*
8 *Longan*, 83 U.S. 271, 274 (1872); see also Cal. Civ. Code § 2936
9 (West 2010). So, as to these claims, the Motion to Dismiss is
10 granted without prejudice.

11 Plaintiff also claims fraud in relation to the UCL. The UCL
12 prohibits unlawful, unfair, and fraudulent business practices. Cal.
13 Bus. & Prof. Code § 17200 et. seq. While Plaintiff goes into great
14 detail about what he believes are the fraudulent business practices
15 of Defendants, he falls to allege both how they could have cause
16 and that they did cause any actual injury he suffered as a result.
17 The Plaintiff can seek to recover that person interest in money or
18 property which he lost due to the unfair competition. *Pineda v.*
19 *Bank of America, N.A.*, 50 Cal. 4th 1389, 1401 (2010). The 2004
20 amendments to the UCL specifically require that the Plaintiff have
21 suffered an actual injury. California Business and Professions
22 Code § 17204, *Kwikset Corp. V. Superior Court*, 51 Cal. 4th 310
23 (2011). The allegations in the FAC does not relate to conduct of
24 the Defendants as to the Plaintiff in his transaction, but what
25 subsequently occurred between the Defendants and other persons.

26 As such, Plaintiff's claims under the UCL are dismissed
27 without prejudice and with leave to amend.

28 ///

RESPA

Plaintiff also alleges violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605(e). RESPA creates a series of rights and obligations as between borrowers, lenders, and loan servicers, including an obligation for loan servicers to respond to borrower inquiries. The servicer is then supposed to correct any errors, provide information as to why the account information is not in error, or explain why the information requested is unavailable. 12 U.S.C. § 2605(e)(2).

According to plaintiff, on January 21, 2010, Plaintiff received a "Debt Verification" letter pursuant to 15 U.S.C. 1692(g). This obligation arises when a debt collector (someone other than the original creditor if the obligation was obtained after it went into default, 15 U.S.C. § 1692(g), is attempting to collect a debt. This provision requires that, upon written request, for the collector to verify the obligation for the debtor. However, a verification does not mean that the debt is proven to the satisfaction of the debtor, but that the collector reasonably confirm the obligation from the creditor. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1174 (9th Cir. 2006).

Plaintiff believed it incorrectly stated the amount he owed, so he requested an accounting pursuant to 12 U.S.C. § 2605. (Amd. Compl. ¶ 47.)¹⁴ One reason for the requested accounting is that

¹⁴/Though early in the pleading stage of this case, the Plaintiff has not provided any indication of how he believes the payments were misapplied or the correct computation of this debt based on the payments the Plaintiff made on the loan. Rather, it appears that the "misapplication" of payments is based on a contention that third-party events relating to the "securitization of the note," default swaps, and other transactions should inure to Plaintiff's benefit and repay his

1 Plaintiff believed that third-party payments were being incorrectly
2 applied. (Amd. Compl. ¶ 42.) These third-party payments included
3 the default swaps, traunch sales, sales of certificates in GSR
4 2003-9, and TARP monies. For unstated reasons, Plaintiff asserts
5 that post loan closing sales and transfers of the Note inure to his
6 benefit.

7 Defendants counter that Plaintiff failed to state a claim
8 under RESPA because what he filed was not a qualified written
9 request. However, as mentioned, Plaintiff alleges that he did
10 submit a qualified written report. (Amd. Compl. ¶ 47.) For
11 purposes of determining the propriety of a dismissal before trial,
12 allegations in the complaint are taken as true. *Kossick v. United*
13 *Fruit Co.*, 365 U.S. 731, 731 (1961). Taking Plaintiffs allegation
14 as true, he did file a qualified written report. But this does not
15 determine the ruling on this part of the motion.

16 Defendants contend that even if the Plaintiff alleges having
17 made a qualified written request's RESPA claim is deficient because
18 Plaintiff failed to allege any actual harm. *Pok v. Am. Home Mortg.*
19 *Servicing, Inc.*, 2010 U.S. Dist. LEXIS 9016 (E.D. Cal. 2010). From
20 the pleadings, it is difficult to tell what harm, if any, Plaintiff
21 suffered as a result of not getting the full accounting. In fact,
22 it appears that the only harm asserted is that the Plaintiff does
23 not get to participate in the post loan closing transactions
24 involving the Note. Having shown no right to participate in the
25 post loan closing transactions involving the Note, Plaintiff has
26 not alleged damages, if any, from an alleged violation of this
27 RESPA provision.

28 _____
obligation for the monies he borrowed.

1 As such, Plaintiff's RESPA claims are dismissed without
2 prejudice and with leave to amend.

3 TILA

4 Plaintiff next alleges that Defendants violated the Federal
5 Truth in Lending Act (TILA) by failing to disclose the Pooling and
6 Securitization Agreement (PSA) and its surrounding circumstances.
7 Plaintiff seeks rescission and damages. However, Plaintiff entered
8 into the contract on August 13, 2002, which is when the alleged
9 violation occurred. TILA has a statute of limitations for
10 rescinding contracts, which runs for three years from the date of
11 the transaction. 15 U.S.C. § 1635(f). As the transaction date was
12 August 13, 2002 (over eight years before the filing of this
13 adversary proceeding), the statute of limitations has run as to the
14 rescission claim. TILA also has a statute of limitations for
15 damages, which runs one year from the date of the occurrence of the
16 violation. 15 U.S.C. § 1640(e). As the date of the violation was
17 August 13, 2002, the statute of limitations has also run as to the
18 damages claim.

19 Further, Plaintiff fails to allege how the failure to disclose
20 the PSA violated Plaintiff's rights under TILA. Nothing has been
21 alleged by the Plaintiff concerning the terms of his loan. Rather,
22 he merely asserts that he should have been told of the intended
23 future financial transactions of Bank of America, N.A. and others
24 concerning the negotiation and transfer of the Note. No basis has
25 been provided to the court for such a contention.¹⁵

26
27 ¹⁵/Plaintiff's contention that he should be allowed to
28 participate in and benefit from the Note being negotiate in the
future raises significant issues for borrowers. Participation
swings two ways, both to the benefit and detriment of the

1 For both of the independent grounds of (1) the statute of
2 limitation have expired, and (2) no actual damages having been
3 alleged, no plausible TILA claims have been pled. The TILA claims
4 are dismissed without prejudice and with leave to amend.

5 **CLAIMS UNDER CALIFORNIA CIVIL CODE § 2934**

6 Plaintiff alleges that California Civil Code § 2934 requires
7 notice to the trustor upon substitution of the trustee. However,
8 Section 2934 merely states that when an assignment is recorded it
9 serves as constructive notice of its contents. Section 2934 does
10 not create a cognizable claim for the failure to record a document.
11 Though Plaintiff also asserts that California Civil Code § 2924 has
12 been violated by Bank of America, N.A. he fails to plead a
13 plausible claim for recovery under § 2934 or § 2924.

14 Plaintiff's claim for relief under 2934 is dismissed with out
15 prejudice and with leave to amend.

16 **BREACH OF CONTRACT**

17 Plaintiff alleges that Defendants breached their contract by
18 instructing Reconstruct to file a notice of default. The standard
19 elements for a breach of contract claim are "(1) the contract,
20 (2) plaintiff's performance or excuse for nonperformance,
21 (3) defendant's breach, and (4) damage to plaintiff therefrom."
22 *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th
23 1171 (2008).

24 It is alleged in the FAC that the contract was breached by
25
26
27 participants. Plaintiff has not contended that he was a
28 participant in the future transaction for both the gain and loss.
From the FAC it appears that Plaintiff is seeking to stake out a
position that the financial system takes risks and invests its
monies to derive a benefit solely for the Plaintiff.

1 failing to comply with the contractual provisions by (1)
2 instructing ReconTrust to file a notice of default identifying Bank
3 of America, N.A. as a beneficiary and (2) having ReconTrust
4 identify itself as the agent for the beneficiary.

5 Plaintiff's claim fails on several grounds. If taken as true
6 that the Note had been conveyed, thereby taking the deed of trust
7 with it, then there were no contractual rights to enforce. Bank of
8 America, N.A. cannot "breach" a contract in which it no longer has
9 any obligation to perform. Conversely, if there was still a
10 contract between the Plaintiff and Bank of America, N.A. the
11 alleged default (improperly proceeding with a foreclosure) did not
12 exist. Plaintiff pleads that he defaulted on the Note due to his
13 illness and sought a loan modification.

14 Plaintiff's claim also fails on its face because of the second
15 element. Plaintiff must plead his performance or excuse for
16 nonperformance. Here, Plaintiff failed to perform - he stopped
17 paying on the note - and his complaint has provided no reason why
18 he his nonperformance should be excused. The court cannot draw the
19 reasonable inference that the defendant is liable for the
20 misconduct alleged, *Twombly*, 550 U.S. at 556, if Plaintiff has not
21 pled why his lack of performance is excused.

22 Further, Plaintiff has not pled any damages flowing from the
23 alleged breach of contract. If no contract exists, then no
24 foreclosure occurs. If the contract exists, then Plaintiff has not
25 pled any damages Plaintiff's claim for breach of contract is
26 dismissed without prejudice and with leave to amend.

27 UNJUST ENRICHMENT

28 Plaintiff claims that Defendants made millions in shorting

1 GSR-09 and should have to disgorge those profits. Besides the fact
2 that Plaintiff gives no reason why he is entitled to the alleged
3 ill-gotten gains, unjust enrichment is a "general principle,
4 underlying various legal doctrines and remedies, rather than a
5 remedy itself." *Melchior v. New Line Productions, Inc.*, 106 Cal.
6 App. 4th 779 (2003) (internal citations ommitted).

7 As Plaintiff has failed to state a cause of action in regards
8 to the disgorgement of the "ill-gotten" gains, this claim is
9 dismissed without prejudice and with leave to amend.

10 **DECLARATORY RELIEF**

11 Finally, Plaintiff alleges that multiple parties have claimed
12 ownership of his note. Plaintiff seeks declaratory relief to
13 determine which party actually holds the note and is entitled to
14 payments.

15 Declaratory relief is an equitable remedy distinctive in that
16 it allows adjudication of rights and obligations on disputes
17 regardless of whether claims for damages or injunction have arisen.
18 "In effect, it brings to the present a litigable controversy, which
19 otherwise might only be tried in the future." *Societe de*
20 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th
21 Cir. 1981). The party seeking declaratory relief must show (1) an
22 actual controversy and (2) a matter within federal court subject
23 matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 744 (1998).
24 There is an implicit requirement that the actual controversy relate
25 to a claim upon which relief can be granted. *Earnest v. Lowentritt*,
26 690 F.2d 1198, 1203 (5th Cir. 1982).

27 The court may only grant declaratory relief where there is an
28 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*

1 Kearns, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be
2 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
3 227, 240-41 (1937).

4 Taking Plaintiff's facts as true, he may be entitled to a
5 determination of to whom he is obligated to pay in satisfaction of
6 the claim on his property. However, the court cannot determine
7 which Defendants, if any, are actually asserting interests in the
8 note and deed of trust and which are persons that the Plaintiff is
9 asserting may claim an interest in the note and deed of trust.
10 Given the other uncertain pleadings in the Complaint, the court
11 determines the declaratory relief cause of action fails to plead a
12 plausible claim. If the Plaintiff believes that a proper
13 declaratory relief claim exists, he can include it in a second
14 amended complaint.

15 The claim for declaratory relief is dismissed without
16 prejudice and with leave to amend.

17 JURISDICTION FOR ADVERSARY PROCEEDING

18 Jurisdiction for this Adversary Proceeding exists pursuant to
19 28 U.S.C. § 1334 and the referral to this bankruptcy court pursuant
20 to 28 U.S.C. § 157. This court is authorized to consider whether,
21 in the interests of justice or comity with state courts, from
22 abstaining to hearing a proceeding related to a case under
23 Title 11. 28 U.S.C. § 1334(c)(1). Abstention may be raised by the
24 court *sua sponte* or on motion of a party. *Smith v. Wall Mart*
25 *Stores*, 305 F.Supp.2d 652 (SD MISS 2003).

26 The Plaintiff's Chapter 7 bankruptcy case was filed on May 20,
27 2010. The Chapter 7 Trustee filed a Report of No Distribution on
28 August 21, 2010. Dckt.28. On September 7, 2010, the Plaintiff

1 obtained his discharge. The discharge terminated the automatic
2 stay as to the Plaintiff and property of the Plaintiff, but not
3 property of the bankruptcy estate. 11 U.S.C. § 362(c)(2)(C). It
4 wasn't until almost three months after the discharge was entered
5 that the Plaintiff amended his Schedule B to list the claims in
6 this lawsuit as an asset and claim them as exempt. Dckt. 33. No
7 proof of service of the amendments to Schedules B and C have been
8 filed by the Plaintiff. There is no evidence in the record to show
9 that the Chapter 7 Trustee is aware of this asset.

10 In the months that have passed the Chapter 7 trustee has not
11 asserted any interest in the claims in this adversary proceeding.
12 The Plaintiff represents that he has discussed the claims with the
13 trustee, but no appearance has been made by the trustee, nor has
14 there been an abandonment of the claims.

15 The Plaintiff has chosen to proceed in a Chapter 7 case and
16 immediately discharge his debts, rather than consummate a plan of
17 reorganization and make provisions for some payments to creditors.
18 This litigation has no bearing on the treatment of creditors,
19 payment of claims, or administration of property of the bankruptcy
20 estate. There appears to be no connection or reason for this
21 adversary proceeding to be before this court other than it is a
22 remnant of the completed Chapter 7 proceeding.

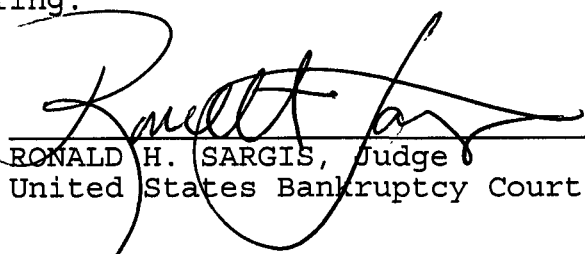
23 If the Plaintiff elects to file a second amended complaint, he
24 must be cognizant of this jurisdictional issue and be prepared to
25 address why this court should not abstain from hearing this
26 adversary proceeding. No Bankruptcy Code issues appear to remain
27 in this case, nor any assets to be administered by the trustee or
28 the Plaintiff through any plan.

RULING

The motion to dismiss is granted and the case is dismissed without prejudice with respect each and every claim stated therein against each and every Defendant. The dismissal is without prejudice and with leave to amend.

This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 and Fed. R. Bankr. P. 7052. The court shall issue a separate order consistent with this ruling.

Dated: June 23, 2011


RONALD H. SARGIS, Judge
United States Bankruptcy Court

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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